Filed 5/10/19 P. v. Latscha CA2/1
(Unmodified opinion attached)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RUDY LATSCHA, Defendant and Appellant.	B283284 (Los Angeles County Super. Ct. No. KA111966) ORDER MODIFYING OPINION AND DENYING REHEARING; CHANGE IN JUDGMENT

It is ordered that the opinion filed on April 18, 2019, be modified as follows:

On page 21, under Disposition, before the last sentence beginning "The trial court is directed," insert the following sentence:

> On remand, the trial court should allow Latscha to request a hearing on his ability to pay the court operations assessment (§ 1465.8) and court facilities assessment (Gov. Code, § 70373) pursuant to *People v. Dueñas* (2019)

> 30 Cal.App.5th 1157. If Latscha demonstrates his inability to pay, the court must strike these assessments. The trial court should also consider whether to allow Latscha to present evidence as to his inability to pay the restitution fine (§ 1202.4). If the court determines that Latscha does not have the ability to pay the restitution fine, it must stay execution of the fine.

This modification changes the judgment. Latscha's petition for rehearing is denied.

JOHNSON, Acting P. J. BENDIX, J. CURREY, J.*

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*Associate Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Filed 4/18/19 P. v. Latscha CA2/1 (Unmodified opinion)
(Opinion following transfer from Supreme Court)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RUDY LATSCHA, Defendant and Appellant.	B283284 (Los Angeles County Super. Ct. No. KA111966)

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Conviction affirmed, sentence vacated, and remanded with directions.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Rudy Latscha was convicted of the January 28, 2016 attempted murder of Louie Gomez; the January 28, 2016 assault with a firearm against Maribel Montoya and Jose Navarro; the February 8, 2016 attempted murder of Gomez; and shooting at an occupied motor vehicle. Firearm and gang allegations were found true, as were allegations that he suffered a prior serious felony conviction and had served one prior prison term.

On appeal, Latscha contends: (1) the attempted murder and discharge of a firearm at a motor vehicle violate the double jeopardy clause of the United States and California constitutions; (2) the assault with a firearm convictions should be reversed under *Kellett v. Superior Court* (1966) 63 Cal.2d 822 (*Kellett*); (3) all convictions should be reversed because the trial court's appointment of retained counsel was unauthorized by law; (4) the attempted murder convictions should be reversed because the court failed to sua sponte instruct on the crime of assault with a firearm; (5) the Navarro assault conviction should be reversed for insufficiency of the evidence; (6) all convictions should be reversed for insufficiency of the evidence with respect to shooter identity; (7) the two 10-year gang enhancement punishments for the attempted murders must be vacated; and (8) the case must be remanded to the trial court to permit the court to exercise its discretion to strike the firearm and prior serious felony conviction enhancements.[1]

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[1] We initially filed this opinion on November 7, 2018. Latscha filed a petition for review, asserting inter alia that in light of Senate Bill No. 1393, effective January 1, 2019, which amended section 1385 to permit a trial court to strike a five-year prior

For the reasons set forth below, we affirm the judgment of conviction. The People concede, and we agree, (1) that the two 10-year gang enhancements must be vacated and that the case must be remanded for the trial court to exercise its discretion whether to strike the firearm enhancements; and (2) on remand the trial court must exercise its discretion whether to strike the prior serious felony conviction enhancement.

FACTUAL BACKGROUND

Latscha, also known as "Tito," was a member of the Bassett Grande gang in the San Gabriel Valley. Latscha had a number of gang-related tattoos, including the letter "B" on his chin (representing the Bassett Grande gang), and the word "Sureno" on the top of his head. A Sureno is a member of any street gang who enters prison and commits crimes for the benefit of the Mexican Mafia prison gang.

Gomez, also known as "Trigger," was a former member of the Bassett Grande gang. Gomez and Latscha grew up in the same neighborhood, and Gomez testified that he had seen Latscha "maybe a handful of times" over the years. Due to safety concerns, Gomez dropped out of the gang while serving a prison sentence and was placed in protective custody. After his release

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serious felony conviction enhancement, he was entitled to a remand to permit the trial court here to consider whether to strike the enhancement. On January 30, 2019, the Supreme Court granted review and transferred the case back to this court with directions to vacate our opinion and reconsider the matter in light of Senate Bill No. 1393.

from prison in 2010, Gomez began selling methamphetamine in his neighborhood. In 2013 or 2014, Gomez began providing information to the police to avoid arrests for minor infractions; on occasion, the Los Angeles Police Department paid Gomez in exchange for information. Prior to Latscha's trial, Gomez was arrested for possession of a loaded firearm, which subjected him to a life sentence under the "Three Strikes" law. After Gomez's testimony at Latscha's preliminary hearing, he entered into a leniency agreement with the district attorney's office, whereby he would be sentenced to one year in jail for his gun possession case in exchange for testifying in Latscha's case.

Montoya, Gomez's girlfriend, testified that she had met Latscha in 2012 on a county jail bus, and had a brief conversation with him. In addition, Montoya had spoken with Latscha on the telephone a few times in early to mid January of 2016. Montoya testified that she had regularly used methamphetamine for eight years up to the time of the January 28 shooting. In addition, Montoya lived with Gomez at the time of the shootings without paying rent, was unemployed, and relied on Gomez for money.

In mid-January of 2016, Gomez was in his front yard with a friend, "Wolfie," when a white truck pulled up. Latscha was in the passenger seat and yelled at Wolfie to "take flight" on Gomez and "get [him]" because Gomez was a "PC," and "no good." A "PC" is a gang drop-out and/or a "green-lighter," which is somebody the gang wants to hurt. To "take flight" means to beat somebody up. Wolfie did not comply. Montoya observed the incident through a window.

On January 28, 2016, Gomez was in front of his house flying a drone airplane with his friend, Navarro. Montoya drove to Gomez's house and parked in the driveway. Shortly

thereafter, Gomez saw a silver car drive up and stop in front of his house; Latscha was hanging out of one of the windows shooting a gun. Latscha aimed the gun at Gomez, but Montoya was between them. As Gomez ran toward his house, he heard nine or 10 gunshots. Gomez was shot in the thigh and ankle. Montoya was shot once in the leg and Navarro, who had been between Latscha and Gomez at one point during the shooting, suffered a graze wound to the leg.

Los Angeles County Sheriff's Department (LASD) Deputy George Meza and his trainee, Deputy Perez, responded to the scene. Deputy Meza recovered five bullet casings from the street and sidewalk. Gomez and Montoya were transported to LAC+USC Medical Center; Navarro was transported to a local hospital. Deputy Vishtasp Munshi interviewed Gomez at the hospital, and Gomez informed the deputy that "Tito" had shot him. Gomez testified that he was "100 percent certain" that Latscha had shot him and that he saw Latscha's chin tattoo "clear as day."

Montoya testified that she talked to the police at Gomez's request. She initially did not want to talk for fear of being labeled a snitch. Montoya identified Latscha in a six-pack photo display and stated she was "100 percent sure" that Latscha was the shooter. Montoya testified that she saw Latscha in the car pointing a gun at her, and recognized his chin tattoo. Although it was dark outside, the car was illuminated by a nearby light pole.

On February 8, 2016, Gomez drove in Bassett Grande territory when he saw Latscha standing on a corner. Latscha pointed a gun at Gomez and shot several times. There were eight bullet holes in Gomez's car, including some in the area of the driver's side door. Deputies Meza and Perez responded to the

scene and discovered one bullet casing in the street. The LASD determined that this casing, and the casings recovered from the January 28 shooting, had all been fired from the same gun. Gomez testified he was "100 percent sure" that Latscha was the person who shot him.

PROCEDURAL BACKGROUND

On June 21, 2016, the Los Angeles County District Attorney's office charged Latscha via information with: attempted willful, deliberate, and premeditated murder on February 8 as to Gomez (Pen. Code,[2] §§ 187, subd. (a), 664; count 1); shooting at on occupied motor vehicle on February 8 (§ 246; count 2); and attempted willful, deliberate, and premeditated murder on January 28 as to Gomez, Montoya, and Navarro (§§ 187, subd. (a), 664; counts 3, 4, and 5, respectively). As to counts 1, 3, 4, and 5, the People alleged Latscha personally used a firearm within the meaning of section 12022.53, subdivision (b), and personally and intentionally discharged a firearm within the meaning of 12022.53, subdivision (c). As to counts 3, 4, and 5, the People alleged Latscha personally and intentionally discharged a firearm, which caused great bodily injury to Gomez, Montoya, and Navarro within the meaning of section 12022.53, subdivision (d). As to all counts, the People alleged Latscha's offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, and assist in criminal

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

gang conduct within the meaning of section 186.22, subdivision (b)(1)(C).

The People also alleged that Latscha suffered a prior serious felony conviction (§ 667, subd. (a)(1)) constituting a strike (§§ 667, subds. (b)-(j), 1170.12) and that he served two prior prison terms (§ 667.5, subd. (b)).

At the preliminary hearing, Gomez testified that he did not tell police officers that Latscha was the person who shot him on January 28. At trial, however, Gomez testified adamantly on cross-examination that he had identified Latscha as the shooter to Deputy Munshi while Gomez was in the hospital. After Gomez's trial testimony, the prosecutor contacted the People's record clerk, and uncovered a two-page supplemental police report by Deputy Munshi that had inadvertently been excluded from discovery. Latscha's attorney moved for a mistrial based on late discovery of Deputy Munshi's report. Recognizing that Latscha's theory of the case relied heavily on Gomez not identifying Latscha after the first shooting, the court granted a mistrial on March 29, 2017. The parties agreed that the People did not commit any misconduct, but that the omission of the report was an oversight by the LASD. The court inquired of Latscha whether he was asking the court for a mistrial, and advised him of the consequences of declaring a mistrial. Latscha stated that he understood the consequences, and that he wanted the court to declare a mistrial.

At a readiness hearing on April 5, 2017, the court appointed the same attorney who represented Latscha at the first trial to represent Latscha in the retrial. On April 14, 2017, the People amended the information to dismiss counts 4 and 5—the attempted murder charges regarding Montoya and Navarro—and

added two counts of assault with a firearm as to Montoya and Navarro (§ 245, subd. (a); counts 6 and 7, respectively). As to count 6, the information alleged that Latscha personally inflicted great bodily injury against Montoya within the meaning of section 12022.7, subdivision (a). As to counts 6 and 7, the amended information alleged gang enhancements pursuant to section 186.22, subdivision (b)(1)(B), and firearm enhancements pursuant to section 12022.5, subdivision (a).

The retrial jury convicted Latscha on all counts, and found all special allegations true. In a bifurcated proceeding, Latscha admitted he had suffered the prior serious felony conviction and had served one prior prison term. The trial court sentenced Latscha to an aggregated term of 23 years and eight months, plus 107 years to life. Latscha timely appealed.

DISCUSSION

I. Double Jeopardy

The United States and California constitutions prohibit the government from putting a person in jeopardy twice for the same offense, thereby protecting criminal defendants from multiple punishments for the same offense. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15; *People v. Anderson* (2009) 47 Cal.4th 92, 103.) The constitutional guarantee against double jeopardy also protects a defendant's right to " 'have his trial completed by a particular tribunal.' " (*Oregon v. Kennedy* (1982) 456 U.S. 667, 671 [102 S.Ct. 2083, 72 L.Ed.2d 416].) In a jury trial, jeopardy attaches once the jurors have been impaneled and sworn. (*Crist v. Bretz* (1978) 437 U.S. 28, 38 [98 S.Ct. 2146, 57 L.Ed.2d 24]; *People v. Fields* (1996) 13 Cal.4th 289, 299.)

Where a mistrial has been declared, the defendant's " 'valued right to have his trial completed by a particular tribunal' is . . . implicated" (*United States v. Dinitz* (1976) 424 U.S. 600, 606 [96 S.Ct. 1075, 47 L.Ed.2d 267]) and discharge of a jury without a verdict is usually "tantamount to an acquittal and prevents a retrial." (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 516.) When a defendant persuades the court to declare a mistrial, however, or even consents to a mistrial, retrial is generally allowed unless "the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." (*Oregon v. Kennedy*, *supra*, 456 U.S. at p. 679; *Stone*, at p. 516; *Evans v. Michigan* (2013) 568 U.S. 313, 318 [133 S.Ct. 1069, 185 L.Ed.2d 124]; .) In other words, only when the government intends to "subvert the protections afforded by the Double Jeopardy Clause" and "the government conduct in question is intended to 'goad' the defendant into moving for a mistrial" will retrial be prohibited after a defendant's successful motion for a mistrial. (*Oregon*, at pp. 675-676.)

Absent governmental misconduct, the "general rule" is that a defendant's motion for a mistrial amounts to " 'a deliberate election on his part to forgo his valued right to have his guilt or innocence determined' " before the first tribunal. (*Oregon v. Kennedy*, *supra*, 456 U.S. at p. 676; *People v. Batts* (2003) 30 Cal.4th 660, 679-680.) After all, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed." (*United States v. Dinitz*, *supra*, 424 U.S. at p. 609.)

Here, defense counsel expressly moved for a mistrial. Prior to granting the motion, the court asked Latscha whether he "understood what we are referring to with regards to a mistrial";

whether he understood that he was "asking this court to stop these proceedings to let these jurors go home" and begin the case "all over again"; and whether he understood that "now this evidence will come in a new trial against you." Latscha replied, "Yes," to all three questions. The court then asked Latscha, "you're asking the court to declare a mistrial at this time?" Latscha replied, "Yes."

Latscha concedes that he requested a mistrial, and even concedes that his motion for a mistrial was not the result of governmental misconduct. Rather, Latscha argues that defense counsel's failure to request Deputy Munshi's supplemental report before trial constitutes deficient performance and the resulting request for a mistrial is the product of a conflict of interest. The conflict of interest Latscha contemplates here is defense counsel's advising him of a choice whether or not to request a mistrial when defense counsel's own conduct was a "substantial factor" in creating the need for a mistrial. Under these circumstances, Latscha argues, a defendant does not retain the "primary control over the course of to be followed" that the double jeopardy clause aims to protect. Latscha asserts that some form of advisement that his counsel's deficient performance contributed to governmental misconduct was required in order to cure this apparent conflict of interest.

First, we do not agree that the omission of Deputy Munshi's report was the result of misconduct by any of the parties. As the court found, and we agree, the oversight here was not unreasonable under the circumstances. At the preliminary hearing, Gomez testified that he did not speak to any police officers after the January 28 shooting. Thus, there was no reason

for the parties to expect to find anything in the discovery materials that would indicate otherwise.

In addition, the only mention of Deputy Munshi's supplemental report appears in a brief statement within Deputy Perez's report: "Deputy Munshi contacted Victim 1 and Victim 2 at L.A. County USC. He collected a GSR sample from both victims. He also interviewed Victim 1 and Victim 2. See his attached supplemental report." A supplemental report was attached, however it was a report authored by Deputy Davanzo, who spoke with Navarro at a different hospital. The confusion, therefore, resulted from the fact that there was a supplemental report attached to Deputy Perez's report, but it related to Navarro, not Gomez.

Second, Latscha provides no state or federal authority for the proposition that double jeopardy principles impose a duty upon the court to advise a defendant that his or her motion for a mistrial may have resulted from defense counsel's allegedly deficient performance. We therefore reject Latscha's urging that we carve out another exception to the rule that only governmental misconduct will bar retrial after a defendant successfully moves for a mistrial.

II. *Kellett*

In *Kellett*, our Supreme Court held that when "the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding." *Kellett*, *supra*, 63 Cal.2d at p. 827.) Failure to do so, "will result in a bar to subsequent prosecution of any offense omitted *if the*

initial proceedings culminate in either acquittal or conviction and sentence." (*Ibid.*, italics added.)

During the retrial, the People dismissed counts 4 and 5 for the attempted murders of Montoya and Navarro, and filed an amended information to add counts 6 and 7 for assault with a firearm against those victims. Latscha argues that *Kellett* precluded the People from filing these charges in the retrial because a "dismissal of the jury . . . constitutes an acquittal of all charged offenses."

As discussed above, Latscha requested a mistrial. His first trial, therefore, by no means resulted in an acquittal. *Kellett* does not prohibit amendment of the information following a mistrial. (See *People v. Brown* (1973) 35 Cal.App.3d 317, 322-323; *People v. Flowers* (1971) 14 Cal.App.3d 1017, 1019-1021.)

III. Court Appointment of Retained Counsel

Latscha argues that all his convictions must be reversed because the court's appointment of Latscha's retained counsel from the first trial to represent him in the retrial "was unauthorized by state law."

Section 987.2 sets forth the procedures for appointing counsel for indigent criminal defendants. In pertinent part, the statute directs trial court to "first utilize the services of the public defender." If the public defender is unavailable, the court shall next appoint the second public defender, if such entity exists. If the second public defender is unavailable, the court shall then utilize the services of county-contracted attorneys. (§ 987.2, subd. (e).) The statute also provides that "a court may depart from that portion of the procedure requiring appointment of the second public defender or a county-contracted attorney after

making a finding of good cause and stating the reasons therefor on the record." (*Ibid.*)

The record reflects that, after the mistrial, the trial court re-appointed Latscha's retained counsel after Latscha submitted a declaration of indigency. There is no record of the trial court inquiring into the availability of the public defender. Nor does the record contain copies of Latscha's declaration of indigency or any other documents relevant to the court's appointment of Latscha's attorney.

Latscha argues the court did not make a " 'good cause' finding" when it appointed retained counsel, and did not place its reasons for the appointment on the record. Latscha argues that prior to the appointment of retained counsel, he was not given an opportunity to consult with the public defender or the alternate public defender and the court never told him that the mistrial may have resulted from his attorney's ineffective assistance of counsel.

Latscha never raised any objection to the appointment of retained counsel in the trial court and has therefore forfeited such a claim on appeal. It is a "well-established procedural principle" that, with certain exceptions, a reviewing court will not consider claims of error that were not raised in the trial court. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.) Only those errors implicating a fundamental or constitutional right may excuse the failure to object. (*Ibid.)* Although the right to counsel is a fundamental constitutional right, a criminal defendant who requires appointed counsel does not have a constitutional right to his or her attorney of choice. (*People v. Thomas* (2012) 54 Cal.4th 908, 924.)

Additionally, the appointment of counsel for an indigent defendant rests within the sound discretion of the trial court. (*People v. Horton* (1995) 11 Cal.4th 1068, 1098.) A trial court abuses its discretion when "it acts unreasonably under the circumstances of the particular case." (*People v. Cole* (2004) 33 Cal.4th 1158, 1185.) Here, we find it entirely reasonable for the court to appoint Latscha's retained counsel given that retained counsel was familiar with the facts of the case, and that Latscha registered no objection to the appointment at trial. Furthermore, Latscha has not produced any evidence that the trial court did *not* inquire into the availability of the public defender prior to Latscha's *first* trial. It very well may be that the court's initial appointment of Latscha's attorney resulted from an inquiry into the availability of the public defender and alternate public defender's offices prior to the first trial. Absent any evidence that the trial court failed to make this inquiry upon appointing Latscha's attorney in the first proceeding, we cannot conclude that the court did not follow the requirements of section 987.2 prior to Latscha's retrial, much less that the court abused its discretion in appointing Latscha's retained counsel.

IV. Attempted Murder Jury Instructions

Latscha contends that his attempted murder convictions in counts 1 and 3 should be reversed because the trial court failed to instruct sua sponte on the lesser offense of assault with a firearm.

Trial courts have a duty to instruct, sua sponte, on all lesser included offenses which are supported by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) They are not, however, required to instruct on lesser related

offenses. The law could be no more clear: a criminal defendant does not have a "unilateral entitlement to instructions on lesser offenses which are not necessarily included in the charge." (*People v. Birks* (1998) 19 Cal.4th 108, 136.)

Assault with a firearm is not a lesser *included* offense of attempted murder, only a lesser *related* offense. (*People v. Nelson* (2011) 51 Cal.4th 198, 215.) The court therefore had no duty to instruct the jury on assault with a firearm as a lesser related offense of attempted murder.

V. Sufficiency of the Evidence

Latscha contends there is insufficient evidence to support the assault with a firearm conviction as to Navarro, and insufficient evidence of shooter identity to support all of Latscha's convictions. Not so.

A. *Standard of Review*

When a defendant challenges the sufficiency of the evidence to support a judgment, we review the evidence under the familiar and deferential substantial evidence standard. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.) Substantial evidence is evidence that is "reasonable, credible, and of solid value." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) We review the record " ' "in the light most favorable to the judgment" ' " and presume the existence " ' "of every fact the trier could reasonably deduce from the evidence." ' " (*People v. Lee* (2011) 51 Cal.4th 620, 632.) It is the "exclusive province of the trial judge or jury to determine the credibility of a witness," and to determine the weight to be given to the testimony adduced at trial. (*Ibid.*; *Hicks*, at p. 429.) Reversal under this standard of review "is

unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

B. *The Navarro Assault with a Firearm Conviction*

Latscha argues that the People did not prove Navarro's location in relationship to Gomez or Montoya's location, that there is no evidence Latscha directly shot at Navarro, and that the People failed to prove that Navarro's wound resulted from a direct targeted hit rather than a ricochet. Even if Latscha is correct that Navarro's location was not established, that Latscha did not shoot directly at Navarro, and Navarro's wound was the result of a ricochet, the evidence nonetheless supports the assault conviction as to Navarro.

It is of no consequence that Latscha did not shoot directly at Navarro. "[I]t is clear that the question of intent for assault is determined by the character of the defendant's willful conduct considered in conjunction with its direct and probable consequences." (*People v. Colantuono* (1994) 7 Cal.4th 206, 217.) The evidence at trial established that Gomez and Navarro were flying drones together in front of Gomez's house. And, Gomez testified that Navarro was between him and Latscha when Navarro got hit. The evidence is clear that Latscha willfully fired a gun multiple times in the direction of Gomez, Montoya, and Navarro. There can therefore be no uncertainty that injury to all three victims would be a direct and probable consequence of this act. The People need not "prove a specific intent to inflict a particular harm," i.e., a direct hit rather than a ricochet. Nor must they establish that Latscha intended to shoot Navarro by shooting directly at him, as "a person who harbors the requisite

intent for assault is guilty of the assault of all persons actually assaulted." (*People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1354-1355.)

Again, the evidence established that Navarro was in Gomez's front yard when Latscha unleashed 10 bullets in their direction. There can be no dispute that Latscha had the ability to inflict a violent injury on any person standing in front of Gomez's house, and that he did in fact injure Gomez, Montoya, and Navarro by firing 10 shots in their direction. Such evidence is more than sufficient to sustain the assault conviction as to Navarro.

C. *Shooter Identity*

Latscha alleged there was insufficient evidence to establish his identity as the shooter because "[n]o reasonable trier of fact could find that Gomez's identification testimony was reasonable, credible and of solid value." According to Latscha, Gomez was a "liar and perjurer" who falsified his identity to shield himself from a potential life sentence for gun possession. Latscha attempts to further support his attack on Gomez's credibility by asserting that Gomez's testimony identifying Latscha as the shooter on January 28 and as the person who encouraged Latscha's friend to "take flight' on him are uncorroborated. Latscha also asks us to discredit Montoya's testimony for two reasons: (1) she only obeyed Gomez's request to talk to the police because she was dependent on him for housing, food, money, and drugs; and (2) despite seeing Latscha shoot at her on January 28, and identifying Latscha's "B" chin tattoo, "she never saw [Latscha's] prominent Sureno forehead tattoo."

With respect to Montoya, we cannot say that failing to observe Latscha's forehead tattoo sabotages the credibility or value of her remaining testimony. Montoya testified that she saw Latscha's face on January 28, observed his chin tattoo, and saw him pointing the gun toward her upper thigh. This constitutes sufficient evidence from which the jury could reasonably deduce that Latscha was the shooter. And, whether Montoya's dependence on Gomez infected her identification of Latscha is a credibility issue for the fact-finder to decide. The jury was aware that Montoya was unemployed, lived with Gomez rent-free, and relied on Gomez for money. They were aware that Montoya did not want to testify, but only did so upon Gomez's request. It is not for us to determine that this impeachment evidence outweighs Montoya's remaining testimony.

With respect to Gomez's uncorroborated testimony, "the testimony of a single witness is sufficient to support a conviction" unless it is "physically impossible or inherently improbable." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) There is nothing physically impossible about Gomez's identification of Latscha, as Gomez was obviously present when Latscha shot at him in January and February.

Nor is Gomez's testimony inherently improbable because he gained an advantage by testifying at Latscha's trial. In advancing the argument that Gomez had reasons to lie on the witness stand, Latscha is asking us to evaluate Gomez's credibility. This we cannot do. Again, only the fact-finder is entitled to determine the veracity of each witness's testimony and the weight to be given to impeachment evidence. The jury was well aware that Gomez was a police informant who had been paid to deliver information to the LAPD, and they knew that Gomez

agreed to testify in Latscha's case in exchange for leniency in his gun possession case. The fact that the jury credited Gomez's identification of Latscha despite the advantage he obtained for doing so does not warrant reversal.

Based on the above, we cannot conclude that " 'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin*, *supra*, 18 Cal.4th at p. 331.)

VI. Gang Enhancements

Latscha argues, and the People concede, that the sentence on the attempted murder counts must be modified to delete the 10-year gang enhancements. We agree.

Under *People v. Lopez* (2005) 34 Cal.4th 1002, 1004, a violent felony punishable by a life term of imprisonment is not subject to the 10-year enhancement under section 186.22, subdivision (b)(1)(C). The trial court here imposed 10-year gang enhancements under this statute for each of the attempted murder convictions; attempted murder, however, is punishable by a life term. (§§ 187, subd. (a), 664, subd. (a).)[3] Accordingly, the judgment must be modified to vacate the 10-year gang enhancements on counts 1 and 3.

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[3] The trial court doubled Latscha's seven-year-to-life sentences for attempted murder to 14 years-to-life under the three strikes law.

VII. Discretion To Strike Firearm Enhancements

Latscha argues, and the People concede, that Latscha's case must be remanded to the trial court to exercise its discretion to strike the firearm enhancements on counts 1 and 3. We agree.

The trial court imposed a firearm enhancement of 20 years pursuant to section 12022.53, subdivision (c), for the attempted murder in count 1, and a 25 years-to-life firearm enhancement pursuant to section 12022.53, subdivision (d), for the attempted murder in count 3. At the time of Latscha's sentencing, trial courts had no authority to strike these firearm enhancements. (See former §§ 12022.5, subd. (c), 12022.53, subd. (h).)

Effective January 1, 2018, section 12022.53, subdivision (h), was amended to allow a court to exercise its discretion to strike or dismiss a section 12022.53 firearm enhancement at the time of sentencing or resentencing. This new legislation applies retroactively to all cases not yet final as of January 1, 2018. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080.) Accordingly, the matter is remanded to allow the trial court to exercise its discretion under section 12022.53, subdivision (h).

VIII. Exercise of Discretion To Strike Prior Serious Felony Enhancement

Section 1385 provides the trial court with discretion to strike an enhancement in the furtherance of justice. At the time of sentencing, subdivision (b) of that section provided: "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." Senate Bill No. 1393, effective January 1, 2019, deleted former subdivision (b). (Stats. 2018, ch. 1013, § 2.) The People concede that, because the judgment in this case is not yet

final, the new law applies retroactively to Latscha. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973; see *People v. Brown* (2012) 54 Cal.4th 314, 319-324.) Accordingly, on remand, the trial court must also exercise its discretion under section 1385 whether to strike the prior serious felony enhancement.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated and the matter is remanded to the trial court with directions to (1) strike the gang enhancements in counts 1 and 3, (2) exercise its discretion whether to strike or dismiss the firearm enhancements under section 12022.53, subdivision (h), (3) exercise its discretion whether to strike the prior serious felony enhancement, and (4) resentence Latscha accordingly. The trial court is directed to prepare an amended abstract of judgment reflecting its changes to Latscha's sentence and forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED

JOHNSON, Acting P. J.

We concur:

BENDIX, J.

CURREY, J.*

* Associate Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.